2010

# CDC Restoration & Construction, LC v. Tradesmen Contractors, LLC : Brief of Appellant

Utah Court of Appeals

**IN THE UTAH COURT OF APPEALS**

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| CDC RESTORATION & CONSTRUCTION, LC,<br>Plaintiff/Appellant,<br>**vs.**<br>TRADESMEN CONTRACTORS, LLC, KENNETH ALLEN, PAUL CARSEY, JAY LASATER, MICHAEL LASATER, SHAUNA LASATER, AND LINDSEY MOUNTEER,<br>Defendants/Appellees. | **BRIEF OF APPELLANT CDC RESTORATION & CONSTRUCTION, LC**<br>Appellate Case No. 20100127-SC<br>Trial Court No. 080908435 |
| THIS IS AN APPEAL FROM THE THIRD DISTRCT COURT SALT LAKE COUNTY, STATE OF UTAH | |


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## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78A-3-102(3)(j), 78A-4-103(2)(j) (2010).

## ISSUES AND STANDARD OF REVIEW

Did the trial court err when it granted summary judgment to Defendants Tradesmen Contractors, LLC, Kenneth Allen, Paul Carsey, Jay Lasater, Michael Lasater, Shauna Lasater, and Lindsey Mounteer (collectively, "Defendants"), thereby dismissing all of CDC Restoration & Construction LC's ("CDC") causes of action against Defendants? Specifically, CDC asserts the following issues on appeal:

I. The trial court erred when it failed to make all reasonable inferences of fact in favor of CDC as the non-moving party, ignored the existence of disputed issues of material fact, and resolved conflicting testimony in favor of the moving party when granting summary judgment to Defendants on CDC's misappropriation of trade secrets claim.

Preservation: This issue was preserved in the record at 369-76 (Transcript of Hearing on Summary Judgment Motion 35:15 – 66:15), and at 326-27 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pp. 19-26).

II. The trial court erred when it dismissed CDC's claim for intentional interference with prospective economic relations based on the Utah Uniform Trade Secret Act's preemption provision, as this claim is not solely predicated upon facts relating to the trade secret claim.

Preservation: This issue was preserved in the record at 377-78 (Transcript of

Hearing on Summary Judgment Motion 67:6 – 73:25), and at 326-27 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, pp. 26-27).

III. The trial court erred when it determined that Carsey, a long-time CDC employee and foreman, did not breach his fiduciary duty to CDC when he competed against CDC while working for CDC.

Preservation: This issue was preserved in the record at 370 (Transcript of Hearing on Summary Judgment Motion 74:2 – 77:10), and at 326-27 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p. 27).

IV. The trial court erred when it dismissed CDC's civil conspiracy claim because the civil conspiracy claim is viable in light of CDC's other claims that were improperly dismissed.

Preservation: This issue was preserved in the record at 326-27 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p. 27).

Standard of Review: Summary judgment is only appropriate when the evidence shows "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). The appellate court "review[s] a district court's decision to grant summary judgment for correctness, with no deference to the district court's conclusions. [The appellate court's] review is limited to determining whether the district court correctly applied the summary judgment standard in light of the undisputed material facts." State v. Mathis, 2009 UT 85, ¶10, 223 P.3d 1119.

In determining whether the trial court "correctly applied the summary judgment standard," the appellate court must determine if the trial court "evaluate[d] all the

evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment." Conder v. A.L. Williams & Assoc., 739 P.2d 634, 637 (Utah Ct. App. 1987). The trial court is not permitted "to judge the credibility of the averments of the parties, or witnesses, or weigh the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact." Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). A single sworn statement under oath is often sufficient to dispute the moving party's averments, to create an issue of fact, and to require the denial of a summary judgment motion." Id. Accordingly, a summary judgment motion can only be granted when it appears there is "no reasonable probability that the party moved against could prevail." See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 45 (Utah Ct. App. 1988) (internal citations omitted).

## STATEMENT OF THE CASE

CDC performed concrete repair and protective coating work at Kennecott Utah Copper's refinery at the Bingham Canyon Mine for many years. CDC performed this work under a Kennecott Preferred Provider Agreement ("PPA"), which contained CDC's specific labor and equipment rates for Kennecott refinery work. CDC's PPA allowed it to perform work at Kennecott. Recognizing the sensitivity of the information contained in this document, Kennecott's PPA with CDC specifically stated that CDC's labor and equipment pricing information was considered "confidential."

In the early 1990's, Defendant Paul Carsey ("Carsey") began working for CDC as a laborer. Eventually, Carsey became the CDC foreman on the Kennecott refinery work.

In mid-January 2006, Carsey resigned from CDC allegedly because he was "burned out" from the concrete repair business.

Carsey's purported reason for resigning was false. In August 2005, many months before he resigned from CDC, Carsey entered into discussions with the other Defendants about starting a business to take the Kennecott refinery work away from CDC.

Defendants planned to obtain this work by starting a new company called Tradesmen Contractors, LLC ("Tradesmen"). Defendants' plan included Carsey, who maintained his employment with CDC as the foreman for the Kennecott refinery work through January 2006, even though his ownership and vice-president position at Tradesmen was formalized (at the latest) during a meeting on December 16, 2005. Another key component to Defendants' plan was Defendant Kenneth Allen ("Allen"), the individual who managed the repairs and protective coating installation at the refinery for Kennecott. Allen's position at Kennecott's refinery gave him access to CDC's confidential pricing information contained in CDC's invoices as well as access to CDC's PPA containing CDC's labor and equipment pricing.[1] Allen took CDC's PPA from Kennecott's files and gave it to the other Defendants to develop Tradesmen's PPA at Kennecott. Given Allen's position at Kennecott and his access to CDC's confidential information, Defendants agreed to hide Allen's involvement with Tradesmen from Kennecott, as Allen's ownership in a company that was submitting a bid for work at

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[1] Kennecott requires all contractors working at Kennecott to have a PPA in place.

Kennecott would have caused problems. Likewise, Carsey's involvement with Tradesmen was hidden from CDC.

In January 2006, Kennecott put its next substantial repair project at the refinery—the E-Bay Project—up for bid. This was a change, as Kennecott had not generally put its refinery repair projects up for bid, instead awarding the work directly to CDC.

Defendants viewed the E-Bay bid as an opportunity to take the refinery work away from CDC. To ensure that Defendants won this bid, Carsey remained a CDC employee and assisted with CDC's bid for the E-Bay Project. Then, the very next day, Carsey and Allen created Tradesmen's bid for the E-Bay Project. Not surprisingly, Tradesmen's bid was lower than CDC's bid, and Kennecott awarded Tradesmen the E-Bay contract. Since February 2006, Tradesmen has performed virtually all of the concrete and coating work for Kennecott at the refinery.

CDC filed a complaint alleging: (1) misappropriation of trade secrets against Tradesmen, Allen, and Carsey; (2) intentional interference with prospective economic relations against Tradesmen, Allen, and Carsey; (3) breach of fiduciary duty against Carsey; and (4) civil conspiracy against all Defendants. At the close of discovery, Defendants filed a motion for summary judgment. After briefing was completed and a hearing on the motion was held, the trial court granted summary judgment on all causes of action, thereby dismissing CDC's claims against Defendants. CDC now appeals.

## STATEMENT OF FACTS

### A. CDC's Work For Kennecott At The Refinery.

1. CDC repairs and installs concrete and other coatings in Utah and surrounding states. (R. 3).

2. From 2003 through 2005, CDC performed continuous concrete repair and restoration work in the basement of the Kennecott refinery at the Bingham Canyon Mine. The refinery's basement requires constant repairs because of the nature of the corrosive chemicals used in the refining process. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 4 attached thereto (D. Larson Dep. 35:1-7)).[2]

3. CDC entered into a Preferred Provider Agreement ("PPA") with Kennecott, which allowed CDC to perform construction work at the refinery on a time and material basis. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 93:3-21) and ex. 7 attached thereto).

4. CDC's PPA with Kennecott, including CDC's pricing information contained in Schedule 7 to the PPA, was confidential. Part 8.3 states that Kennecott was required "to treat as confidential and proprietary, and keep from disclosing to others, or allow others to use, during or subsequent to the Term of [the PPA], without the express prior written

[2] CDC filed Plaintiff's Opposition to Defendants' Motion for Summary Judgment under seal, and therefore Plaintiff's Opposition and the attached exhibits are not fully paginated according to the Record. Instead, the Record index lists the Plaintiff's Opposition to Defendants' Motion for Summary Judgment as located on pages 326 and 327 of the Record. Thus, when citing to Plaintiff's Opposition to Defendants' Motion for Summary Judgment and the exhibits attached thereto, CDC cites specifically to the brief and the corresponding exhibits.

consent of [CDC], [CDC's] Confidential Information." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 7 attached thereto).

5. Part 11.8 defines "Confidential Information" as including "pricing information." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 7 attached thereto).

6. Schedule 7 to CDC's PPA with Kennecott contained CDC's pricing information for its hourly employees as well as a long list of hourly, daily, and weekly rates for various pieces of equipment. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 7 attached thereto).

7. CDC had developed its confidential pricing information over years of experience at Kennecott. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 93:1 – 97:10)).

**B. Defendant Paul Carsey.**

8. In the early 1990's, Carsey began working for CDC as a laborer and eventually became a CDC foreman. (R. 205 (P. Carsey Dep. 16:8-22)). He worked as a foreman at Kennecott's refinery during the 2003-2005 time period. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 38:15-22)).

9. While employed with CDC, Carsey never signed a confidentiality agreement. (R. 222 (R. Midgley Dep. 140:22-25)). However, Carsey knew CDC's pricing was confidential. In fact, at times when CDC was performing construction work at the refinery, CDC would give its invoices to Carsey in sealed envelopes with instructions that

the information in the envelope was "confidential" and should only be given to Allen, who was acting as Kennecott's construction manager at the refinery. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 39:5 – 40:21)).

10. In January 2006, Carsey resigned from CDC. Carsey told Ralph Midgley ("Midgley"), the owner of CDC, that he was quitting CDC because Carsey was "burned out" and that he was going to go "flip houses." (R. 208-09 (P. Carsey Dep. 124:17 – 125:4)).

11. Although Tradesmen claims that Carsey did not begin working for Tradesmen in February 2006, the evidence establishes that Carsey was an owner in Tradesmen, and working for Tradesmen, well before the time he left CDC. In August 2005, Carsey began speaking with the other Defendants about starting a business to obtain the work that CDC performed at Kennecott's refinery. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1 attached thereto (M. Lasater Dep. 12:16 – 15:20)).

12. By mid-December, Carsey and the other Defendants attended a meeting of the Board of Directors of Tradesmen. At this meeting, Carsey was elected Tradesmen's vice-president and project developer, and Carsey's ownership interest in Tradesmen was formalized. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1 attached thereto (M. Lasater Dep. 36:18 – 37:17 & ex. 3 thereto)). Carsey admits that the December 16th minutes accurately reflect what transpired at that meeting. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 100:25 – 108:3)). All of these events

occurred well before Carsey's last day at CDC in mid-January 2006. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 94:2-10)).

**C. Defendant Ken Allen.**

13. Allen worked as a project manager, coordinator, and director for Kennecott for about 28 years. (R. 233 (K. Allen Depo 5:7-9)). In 2005, Allen was employed as a project manager at Kennecott's refinery and, in this capacity, supervised CDC and other contractors. (R. 234 (K. Allen Depo 6:4-11)).

14. Allen was not technically a Kennecott employee; instead, Allen worked for an independent contractor who supervised work done at the Kennecott refinery and reported directly to Kennecott. (R. 233 (K. Allen Depo 5:4-9)).

15. As a project manager at the Kennecott refinery, Allen had access to, and was required to know and understand, the pricing information for the contractors he supervised, including CDC. (R. 235 (K. Allen Depo 7:10-16)). CDC submitted its invoices to Allen for approval before the invoices would be paid by Kennecott. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 5 attached thereto (D. Woolley Dep. 19:10 – 20:10, 22:10 – 23:11), ex. 4 attached thereto (D. Larsen Dep. 17:19 – 18:3) and ex. 6 attached thereto (K. Allen Dep. 152:11 – 153:9, 166:5 – 171:22)).

16. In December 2005, Allen left the Kennecott refinery to be a project manager at Kennecott's smelter. (R. 236-37 (K. Allen Depo 30:23 – 31:8)).

17. Allen also formalized his ownership interest in Tradesmen at the late 2005 organizational meeting. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K Allen Dep. 34:1 – 35:17)).

18. Allen knew that he had to hide his ownership in Tradesmen from Kennecott. Defendant Shauna Lasater ("S. Lasater"), a Tradesmen owner, testified that Allen told her not to let Kennecott know that Allen was going to be a part owner of Tradesmen. S. Lasater further testified that Allen explicitly told her not to fax anything to his office at Kennecott and not to "tell the people that you talk to [at Kennecott] that I'm part of this [Tradesmen]." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 2 attached thereto (S. Lasater Dep. 35:24 – 37:17)).

19. Consistent with S. Lasater's testimony, Allen knew that he could not tell Kennecott the truth about his ownership interest in Tradesmen. Kennecott's Dan Larsen ("Larsen") testified that he was unaware of Allen's ownership in Tradesmen and, if Larsen had known of Allen's involvement with Tradesmen, "it would have definitely brought some concerns." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 4 attached thereto (D. Larsen Dep. 62:15 – 63:10)).

20. Kennecott's Dennis Woolley ("Woolley"), a Kennecott superintendent at the refinery, likewise testified that if he had known about Allen's ownership in Tradesmen, it would have created an issue." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 5 attached thereto (D. Woolley Dep. 44:14 – 46:13, 60:18 – 63:17)).

21. And finally, Allen knew he had to hide his involvement from Susan Smithwick ("Smithwick"), a Kennecott employee over procurement. Smithwick testified that Allen's ownership would have raised a conflict of interest problem. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 8 attached thereto (S. Smithwick Dep. 34:10-20)).

22. So, to keep his ownership in Tradesmen a secret from Smithwick while still shepherding Tradesmen through the Kennecott procurement process, Allen sent an email message to Smithwick, in which Allen intentionally misrepresents his relationship with Tradesmen. Allen's December 2005 email message reads:

> I have had a couple of calls from a company called Tradesmen Contractors. They are coating people and concrete repair people. I don't see them on our contractors list. Your name was given as their contact person. I don't know who Susan Southwick is[,] do you? Do they have a PPA? I would like to see some rates if they do. I think this is the same group that we talked about earlier this year when the roofing project was becoming active. I am going to loose some key people at the end of the year and will be looking for a contractor to replace them. Let me know if they are approved. Thanks.

(R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 8 attached thereto (S. Smithwick Dep. 32:2 – 33:16 & ex. 34 thereto)). This email specifically hid the fact that Allen was involved with Tradesmen.

23. Allen himself admitted that this email was "false." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K. Allen Dep. 86:11-19)).

**D. Tradesmen Uses CDC's PPA.**

24. A PPA must be entered into before contractors can bid and work on projects at Kennecott. A PPA is binding for three years and contains pricing information intended to finalize contractor rates so Kennecott can have some assurance about what a project will cost, and so that contractors do not adjust their pricing from one project to another. (R. 266 (S. Smithwick Dep. 28:13-21, 64:21 – 65:13)).

25. There is no dispute that Defendants used CDC's PPA to devise pricing information for Tradesmen's PPA. Allen testified that Tradesmen used the pricing in CDC's PPA for "determining what Tradesmen's labor rates were going to be" and "to establish a foundation" for Tradesmen. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K Allen Dep. 38:8 – 45:24, 48:13-25 & ex. 21, 22 thereto)).

26. Michael Lasater ("M. Lasater") testified that Allen gave him CDC's pricing and that Tradesmen used these documents as a "starting point" to formulate their wage structure. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1 attached thereto (M. Lasater Dep. 39:15 – 49:10, & ex. 4, 5, 6, 7 thereto)).

27. Defendants also copied CDC equipment list and pricing virtually verbatim in the PPA that Tradesmen submitted to Kennecott. A comparison of Schedule 7 to CDC's PPA and the pricing that Tradesmen provided to Kennecott in November 2005 demonstrates this. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 7 and 11 attached thereto).

28. Allen and M. Lasater claim that they also used their own knowledge and experience to devise Tradesmen's PPA pricing information, as well as pricing information from third-party vendors such as equipment rental companies. (R. 199-200 (M. Lasater Dep. 31:9 – 32:23); R. 242 (K. Allen Dep. 64:3-13); R. 248-50 (K. Allen Dep. 95:14-17, 96:2-6, 97:18-23)).

29. This testimony is conflicted by the above-referenced admission that they used CDC's employee pricing to "establish a foundation" for Tradesmen's labor rates and copied CDC's equipment list and pricing. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K Allen Dep. 38:8 – 45:24, 48:13-25 & ex. 21, 22 thereto)).

**E. The E-Bay Project at the Refinery.**

30. In late 2005, Kennecott decided to put the contract for the E-Bay Project up for bid. On January 5, 2006, a pre-bid walkthrough was conducted at the refinery for the E-Bay Project. CDC took Carsey to the pre-bid walkthrough, as CDC was unaware that Carsey had joined Tradesmen with the intent to take the refinery work away from CDC. Midgley specifically asked Carsey during the walkthrough if he knew anything about Tradesmen, as Tradesmen was present at the walkthrough. Carsey lied and told CDC that he did not know who they were. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 222:21 – 223:14)).

31. In the days following the pre-bid walkthrough, Carsey assisted with the preparation of CDC's bid for the E-Bay Project, including helping CDC estimate the

manpower and time needed to accomplish the Project and, in some instances, what equipment [CDC] would need. Midgley also testified that Carsey "even helped with the estimated amounts [for the materials]." Essentially, according to Midgley, Carsey assisted with every aspect of CDC's bid for the project, and contributed to "the totals" for the bid. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 150:9 – 153:15), and ex. 3 attached thereto (P. Carsey Dep. 82:4 – 83:12)).

32. Tradesmen claims that Allen formulated Tradesmen's bid by himself based on his 28 years of experience as a project manager, coordinator, and director for Kennecott, including his experience as a project manager at the Kennecott refinery in 2005. (R. 245-(K. Allen Dep. 92:6 – 102:7)). Carsey likewise asserts that he did not assist Allen with Tradesmen's bid for the E-Bay Project. (R. 206 (P. Carsey Dep. 83:13-16); R. 261-62 (K. Allen Dep. 228:14 – 229:12)).

33. However, Allen and Carsey's self serving testimony is contradicted by the other members of Tradesmen. According to M. Lasater, Carsey was with Allen at Tradesmen's offices working on Tradesmen's E-Bay bid the night before that bid was due to Kennecott. M. Lasater further testified that Carsey provided input as to the labor costs for the Project, including how long the project would take, including "how much labor was going to be used and how much time." In fact, M. Lasater heard Carsey and Allen discuss how much the labor costs would be for the bid. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1 attached thereto (M. Lasater Dep. 33:24 – 33:14)).

34. The labor rates for the E-Bay Project were significant considering the majority of the bid was comprised of labor costs. Tradesmen's bid was $141,575, and labor costs made up $98,875 of that total bid, meaning that labor costs contributed to 67% of Tradesmen's total bid. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 8 attached thereto (S. Smithwick Dep., ex. 13 thereto)).

35. The evidence also demonstrates that although Carsey and Allen were not friends, they were in constant telephone contact with each other throughout early January, including the day before the pre-bid walkthrough for the Project (January 5, 2006), the day Carsey assisted with CDC's bid for the E-Bay Project (on or about January 11, 2006), and the day before the bid for the Project was due (January 12, 2006). (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 84:22 – 94:1 & ex. 42 thereto)).

36. Tradesmen's initial bid for the E-Bay Project was $131,450 (the "Initial Bid"). However, on the day bids for the E-Bay Project were due, S. Lasater was unable to input the Initial Bid into Procuri (Kennecott's electronic bid-submission process). S. Lasater phoned Allen for assistance with entering the Initial Bid into Procuri, but he did not have his bid sheets in front of him. Therefore, while speaking with S. Lasater on the phone, Allen asserts that he created and provided S. Lasater with a new bid which she entered into Procuri. Tradesmen's new bid for the E-Bay Project was $141,575. (R. 256-60 (K. Allen Dep. 103:2 – 107:21)).

37. On January 13, 2006, CDC, Tradesmen, and Keene Coatings submitted separate bids for the E-Bay Project. Keene Coatings submitted the lowest bid, Tradesmen's bid was the second lowest, and CDC's bid was the highest. (R. 290).

38. On January 24, 2006, after reviewing and discussing the bids submitted by CDC, Tradesmen and Keene Coatings, Kennecott decided that:

> After reviewing the bids and talking this over with [Kennecott's Maintenance Coordinator] we felt Tradesmen/Paul Carsey should do this work. Working in the tank house basement is dangerous and felt his experience and concern for safety were a good fit to have the repairs completed in the E-Bay project.

(R. 186). However, while Kennecott states that Carsey's experience was a factor in evaluating the bids, Kennecott specifically testified that price was a "primary" concern and that CDC was qualified from an "experience" perspective to do the work. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 5 attached thereto (D. Woolley Dep. 56:6 – 58:1, 85:19 – 86:25)).

39. Tradesmen worked on the E-Bay Project for at least six months and immediately thereafter began another large project on the D-Bay at Kennecott's refinery. The D-Bay project, and many other subsequent projects, was not put up for competitive bid. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 4 attached thereto (D. Larsen Dep. 71:17 – 73:1, 77:2-5)).

40. Tradesmen continues to perform work at Kennecott's refinery. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 12 attached thereto).

## SUMMARY OF THE ARGUMENT

The trial court erred when it granted summary judgment in favor of Defendants on all claims, thereby dismissing CDC's entire lawsuit against Defendants. First, the trial court failed to make all reasonable inferences of fact in CDC's favor when determining that CDC's PPA labor and equipment pricing information was not a "trade secret" under the Utah Uniform Trade Secret Act because the information therein purportedly could be ascertained from other sources. The summary judgment Record established that Defendants took CDC's confidential PPA from Kennecott's files and used it as a "foundation" to develop Tradesmen's PPA pricing. Plainly, Defendants believe that CDC's PPA pricing was valuable enough to take and use. Moreover, the trial court's assumption that Carsey and Allen had the knowledge to develop such pricing information, or that such information was generally ascertainable, was improper at the summary judgment stage.

Second, the trial court failed to make all reasonable inferences of fact in CDC's favor and failed to acknowledge disputed issues of material fact when determining that Tradesmen, Carsey, and Allen did not actually use CDC's bid information when formulating Tradesmen's bid for the E-Bay Project. Both CDC and Carsey testified that Carsey helped with CDC's E-Bay bid. Tradesmen member M. Lasater testified that Carsey then helped with Tradesmen's E-Bay bid the very next day. The rational inference to be drawn from these facts is that Carsey used CDC's bid information against CDC when he helped develop Tradesmen's bid.

Third, the trial court erred when it dismissed CDC's claim for intentional interference with prospective economic relations based on the Utah Uniform Trade Secret Act's preemption provision barring other "conflicting torts." In doing so, the trial court failed to acknowledge that deceit and misrepresentation and other improper acts that would support a claim for intentional interference with prospective economic relations, either in addition to, or in place of, a misappropriation of trade secrets claim.

Fourth, the trial court erred when it determined that Carsey did not owe CDC a fiduciary duty. Utah law indicates that employees do owe their employers a duty of loyalty, honesty, and non-competition while employed with that particular employer. Carsey violated that duty when he established his ownership interest and executive position with Tradesmen, and then worked with Tradesmen to directly compete with CDC for work at Kennecott all while still employed at CDC. Carsey could have been honest with CDC about his intent to join Tradesmen. Instead, he chose to mislead CDC and to secretly compete against, and undermine, CDC.

Finally, CDC argues that when its other claims are reinstated because of the trial court's errors, that its claim for civil conspiracy must also be reinstated because there would be a viable claim to sustain a claim for civil conspiracy.

## ARGUMENT

### I. THE TRIAL COURT IMPROPERLY DISMISSED CDC'S MISAPPROPRIATION OF TRADE SECRETS CLAIM.

To prove its claim that Tradesmen, Carsey and Allen, misappropriated trade secrets, CDC must prove three elements: (1) the existence of a trade secret, (2)

communication of the trade secret to [the defendant] under an express or implied agreement limiting disclosure of the secret, and (3) [the defendant's] use of the secret injures [the plaintiff]." Water & Energy Systems Tech., Inc. v. Keil, 1999 UT 16, ¶9, 974 P.2d 821. "The threshold issue in every case is whether, in fact, there is a trade secret to be used." Microbiological Research Corp., v. Muna, 625 P.2d 690, 696 (Utah 1981).

CDC identified two independent and distinct trade secrets that Defendants misappropriated and then used against CDC in violation of the Utah Uniform Trade Secret Act ("UUTSA"). First, the summary judgment Record established that Defendants used the labor and equipment rates in CDC's PPA to develop their own PPA, which Defendants were required to submit in order to be qualified to perform work at Kennecott. Second, the summary judgment record demonstrated that Carsey worked on CDC's bid for the E-Bay Project and then, the next day, helped prepare Tradesmen's bid for the same project.

In its ruling, the trial court found that: (1) the labor and equipment pricing information contained in CDC's PPA was not a trade secret under the UUTSA; and (2) Tradesmen, Carsey and Allen did not actually use CDC's bid information when it formulated Tradesmen's bid for the E-Bay Project. However, in making its ruling, the trial court failed to account for the myriad of disputed issues of material facts or to make all reasonable inferences of fact in favor of CDC. Thus, summary judgment on CDC's claim for misappropriation of trade secrets was inappropriate.

### 1. CDC's labor and equipment pricing in its PPA was a trade secret.

The trial court found that the evidence was insufficient to show that CDC's PPA was a trade secret because CDC "failed to present evidence that is sufficient to establish a genuine issue of material fact that its labor and equipment rates derive independent economic value from not being generally known to, and not being readily ascertainable by [Tradesmen, Carsey and Allen]." (R. 344). Under the UUTSA, a trade secret is information, "including a formula, pattern, compilation, program device, method, technique, or process" that:

> (a) derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Utah Code Ann. § 13-24-2(4) (2010).

CDC's PPA set forth prices for employees and equipment at Kennecott based upon years of experience, which allowed CDC to make a profit, stay in business, and position itself for further work at Kennecott. This pricing was memorialized in the PPA between CDC and Kennecott, a document that recognized CDC's pricing information was "confidential" and stated that this information would not be provided to others. Defendants themselves testified that Allen took CDC's PPA and then used CDC's pricing to determine "what Tradesmen's labor rates were going to be," "to establish a foundation" for Tradesmen, and as a "starting point" to formulate Tradesmen's wage structure. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary

Judgment, ex. 6 attached thereto (K Allen Dep. 38:8 – 45:24, 48:13-25, & ex. 21, 22 thereto)). Clearly, Defendants believed that CDC's PPA information had economic value.

What the trial court focused on in its ruling, however, is whether this information was generally known or readily ascertainable to Carsey and Allen. The Utah District Court in Utah Med. Prods. v. Clinical Innovations Assocs., 79 F. Supp.2d 1290, (D. Utah 1999), discusses the UUTSA's requirement that a trade secret exists when the alleged trade secret "derives independent economic value from not being generally known to, and not being readily ascertainable." Utah Code Ann. § 13-24-2(4). The court explained that "the 'subject matter of the trade secret must be unknown; it should not be in the public domain or within the knowledge of the trade.'" Utah Med. Prods., 79 F.Supp.2d at 1312 (quoting Muna, 625 P.2d at 696).

In making its ruling that CDC's PPA pricing information was "readily ascertainable," the trial court considered Carsey's own personal knowledge and experience as a construction foreman for CDC and Allen's own personal knowledge and experience as a project manager for Kennecott. However, even considering Carsey and Allen's personal knowledge and experience in the industry, the testimony illustrates that CDC's pricing information contained in the PPAs were unknown to Carsey and Allen before they took and improperly used this information. Nor is there any evidence that this information could be obtained elsewhere. The fact that Defendants did not even try to develop this information supports the inference that they did not have the ability to do

so. Simply put, if Defendants could have easily developed pricing for their PPA without using CDC's confidential information, why did they not do so?

Case law considering analogous factual situations demonstrates that a contractor's bid price and pricing structure received trade secret protection, and shows why the trial court's assumption that such information is readily ascertainable in incorrect. For example, in B&G Crane Service LLC v. Duvic, 935 So.2d 164, 165 (La. App. 2006), the plaintiff provided crane rentals for construction jobs. The defendant hired one of the plaintiff's employees who, when he left the plaintiff's employment took with him the plaintiff's "confidential bid/quote information, auto-cad drawings and other confidential files." Id. The defendant then used these documents "to competitively bid against [the plaintiff]." Id. The court in B&G Crane gave credence to the testimony that "the general practice in the construction industry is that contractors' bids are submitted under seal and not disclosed to other contractors bidding on the project, and are submitted with the expectation that they will remain private and closed." Id. at 167. The B&G Crane court granted an injunction to the plaintiff holding that "while under the employ of B&G, [the individual defendant], in collusion with [the corporate defendant], wrongfully misappropriated B&G's confidential pricing and bid/quote information . . . without authorization, terminated his employment with B&G and immediately . . . began unlawfully using that information to compete with B&G in an attempt to win bids." Id. at 168-69.

Moreover, other case law also indicates that bid pricing and information is a trade secret. In Ovation Plumbing v. Furton, 33 P.3d 1221 (Colo. App. 2001), the plaintiff was

a plumbing subcontractor for a large real estate developer. The plaintiff terminated defendant's employment and, shortly thereafter, the plaintiff and the defendant both submitted bids to the large real estate developer on another project. The defendant was awarded this second project. Id. at 1223. The plaintiff filed an action alleging that the defendant used the plaintiff's "confidential contract pricing and bid information" to obtain the second project. The jury found against the defendant. Id. The Colorado Court of Appeals affirmed the verdict, concluding that bid pricing information met the definition of trade secret under Colorado law. Id. In its opinion, the court focused on the underlying purpose of the trade secret statute by stating that "[n]ovelty and invention are not required for a trade secret. The protection is merely against breach of faith and reprehensible means of learning another's secret." Id. at 1224.

Similarly, in the present case, CDC's specific PPA labor and equipment pricing information should receive trade secret protection. Yes, Carsey and Allen may have some knowledge of construction pricing through their work experience, but it is their particular knowledge of CDC's *specific* pricing for the concrete repair and coating jobs at Kennecott that is problematic. Such *specific* information to CDC was not readily known and generally ascertainable to Carsey and Allen through proper means. Nor did Carsey or Allen even try to develop their own PPA pricing without using CDC's information. The fact that Carsey and Allen knew CDC's specific pricing information gave Tradesmen a significant advantage and head start—one that CDC would not have given to them if it had known that Carsey and Allen were involved in the competition and an advantage that Kennecott would not have allowed Tradesmen to have.

**2. The trial court failed to give all reasonable inferences of fact to CDC that Tradesmen, Carsey, and Allen used CDC's confidential E-Bay bid information to establish Tradesmen's bid for the E-Bay Project.**

The trial court also found that CDC "failed to present evidence that is sufficient to establish a genuine issue of material fact that [Tradesmen, Carsey and Allen] "(i) used [CDC's] labor or equipment rates for Tradesmen's own bid for the project; (ii) used [CDC's] labor rates for Tradesmen's own PPA with [Kennecott]; or (iii) ever saw or made use of [CDC's] bid for the Project." (R. 344). However, in deciding that Tradesmen, Carsey and Allen did not actually use CDC's bid information for the E-Bay Project, the trial court failed to make all reasonable inferences of fact in favor of CDC.

First, Carsey worked on all aspects of CDC's bid submittal for the E-Bay Project. CDC's owner Ralph Midgley's deposition testimony is that Carsey was involved with every aspect of the bid, including estimating the amounts for both materials and labor, and that his help contributed to the totals for CDC's bid on the E-Bay Project. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 150:9 – 153:15)). However, after being so involved in establishing CDC's bid for the E-Bay Project, Carsey immediately began helping Tradesmen with its bid for the same project. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1 attached thereto (M. Lasater Dep. 33:24 – 33:14)). Since Carsey had worked on CDC's bid for the E-Bay Project the day before he worked on Tradesmen's bid, Carsey knew how large CDC's work crew would be and how many labor hours CDC was going to use in its bid. All Carsey had to do when formulating the labor costs for Tradesmen was make Tradesmen's bid lower that

CDC's—either by using a lower price for Tradesmen's labor costs, using a lower total number of hours in labor, or using some combination of the two. Essentially, Carsey guaranteed that Tradesmen's bid was lower than CDC's bid because he helped develop what CDC's specific bid information for the E-Bay Project was going to be.

Defendants rely on Allen's self-serving testimony that he did the entire E-Bay bid preparation work by himself and Carsey's testimony that he did not help with the bid. The most important piece of evidence contradicting Allen's and Carsey's testimony comes directly from ***Allen's own business partner*** at Tradesmen. In his deposition testimony, M. Lasater states that Carsey, who was then still a CDC employee, was with Allen at Tradesmen's offices working on Tradesmen's bid for the E-Bay Project the night before that bid was due to Kennecott. Id. M. Lasater further testified that Carsey gave input as to the labor costs for the E-Bay Project, including how long the project would take, including "how much labor was going to be used and how much time." Id. In fact, M. Lasater heard Carsey and Allen discuss how much the labor costs would be for the bid. Id. M. Lasater's testimony is clear and unequivocal. At a minimum, this contradiction in testimony is a disputed issue of fact that should have been presented to a jury.

Further, there is additional evidence that Carsey used CDC's bid information to help Allen with preparing Tradesmen's bid for the E-Bay Project. Carsey and Allen's phone records establish that they were in constant contact with each other throughout early January, including the day before the pre-bid walkthrough for the E-Bay Project (January 5, 2006), the day Carsey assisted with CDC's bid for the E-Bay Project (on or

about January 11, 2006), and the day before the bid for the E-Bay Project was due when Allen was working on Tradesmen's bid (January 12, 2006). (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 3 attached thereto (P. Carsey Dep. 84:22 – 94:1 & ex. 42 thereto)). This contact between Allen and Carsey on key dates throughout the bid process leads to a reasonable inference that they discussed how CDC was formulating its bid for the E-Bay Project and how Tradesmen should formulate its bid in response, so that Tradesmen's bid would come in lower.

Also, on the day that Tradesmen's bid was due, S. Lasater was unable to input Tradesmen's Initial Bid of $131,450 into Procuri (Kennecott's electronic bid-submission process). (R. 256-60 (K. Allen Dep. 103:2 – 107:21)). S. Lasater phoned Allen for assistance with entering the Initial Bid into the system, but he did not have his bid sheets in front of him. Id. So, while speaking with S. Lasater on the phone, Allen asserts that he created and provided S. Lasater with a new bid which she entered into Procuri. Id. Tradesmen's new bid for the project was $141,575. Id. However, it is not clear that S. Lasater misplaced or lost the bid numbers, but just that she needed help entering them. And yet, Allen changed the initial bid at the last minute adding approximately $10,000 to Tradesmen's bid. CDC suggests that the inference the trial court should have drawn from this testimony is that Allen knew he could increase the bid approximately $10,000 because Allen knew the revised Tradesmen's bid would still be below CDC's bid.

### 3. The summary judgment record established that Defendants took and used CDC's confidential and trade secret information against CDC.

By granting summary judgment for Defendants on CDC's misappropriation of trade secrets claim, the trial court ignored the disputed issues of material facts and did not give the proper inferences to CDC as the non-moving party. What the summary judgment evidence shows, and what the jury should be allowed to hear, is that the Defendants decided that they wanted to perform the concrete repair work at Kennecott's refinery. Rather than use their own skills and ability and ingenuity to develop a PPA that would open the door to work at Kennecott, Defendants took CDC's PPA, copied the equipment rates verbatim, and used CDC's labor pricing as a "foundation" to develop the labor pricing for Tradesmen's PPA.

Allen lied to Kennecott about his involvement with Tradesmen the whole time, as he knew that Tradesmen would not be allowed to perform work at Kennecott if Allen was open and honest about his ownership in Tradesmen. Carsey likewise behaved dishonestly towards CDC, specifically lying to CDC about his involvement with Tradesmen and helping Tradesmen prepare its bid for the E-Bay Project the day after he assisted on CDC's bid for the E-Bay Project. All during this time, Carsey and Allen were in constant contact, as evidenced by the phone records. Again, rather than use their skills, ability and ingenuity, Defendants sought to gain an unfair competitive advantage. From these facts, with very limited and reasonable inferences, the jury would conclude that Defendants engaged in the type of "breach of faith and reprehensible means of learning of another's trade secret" on which trade secret act violations are founded.

CDC does not object to fair and open competition, but these facts demonstrate that Defendants did not behave honestly or compete fairly. Thus, the trial court's grant of summary judgment on CDC's claim for misappropriation of trade secrets should be reversed.

## II. CDC'S INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS CLAIM IS NOT PRE-EMPTED BY THE TRADE SECRET ACT.

In its order dismissing CDC's claim of intentional interference with prospective economic relations against Tradesmen, Carsey and Allen, the trial court stated that the evidence was insufficient to establish "that Tradesmen, Paul Carsey or Kenneth Allen acted by improper means that does not arise from a factual episode that necessarily relies on the information at issue being a trade secret," and "[c]onsequently, [CDC's] claim for intentional interference with prospective economic relations is barred by the preemption provision of the Utah Uniform Trade Secrets Act." (R. 345). However, the rationale on which the trial court bases its ruling is misplaced.

The trial court was incorrect for two reasons. First, the preemption provision of the UUTSA does not provide blanket preemption for all tort claims stemming from a factual scenario which in some way involves a misappropriation of trade secrets or other confidential information. Second, misappropriation of trade secrets is not the only factual basis for CDC's claim for intentional interference with prospective economic relations.

The preemption provision of the UUTSA "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." Utah Code Ann. §13-24-8 (2010). Accordingly, the UUTSA preempts other

torts that would provide a civil remedy for the "misappropriation of a trade secret." And, although Utah courts have not discussed what constitutes a "conflicting tort" under the UUTSA, the uniform statutory provision has been discussed at length by other jurisdictions that have adopted the Uniform Trade Secret Act.

The court in Powell Prods. v. Marks, 948 F. Supp. 1469 (D. Colo. 1996), lays out the three prevailing positions on the Uniform Trade Secret Act preemption provision. After reviewing several jurisdictions' decisions, the court determined the following:

> Several courts have stated that where a plaintiff alleges in his complaint that information was misappropriated and that such information constituted trade secrets, all claims that are factually related to that misappropriation are preempted. Other courts reason that a plaintiff should be permitted to proceed upon all causes of action "to the extent that the causes of action have more to their factual allegations than the mere use or misappropriation of trade secrets." Finally, some courts have held that common law tort claims are preempted only "to the extent directed at trade secret misappropriation," implying that certain common law claims do not depend upon the information misused being in the nature of a trade secret.

Id. at 1474 (internal citations omitted).

Regarding the first position, the court in Powell Products refused to apply "a blanket preemption to all claims that arise from a set of circumstances that happen to involve information that the plaintiff claims is in the nature of a trade secret." Id. at 1474. The court stated that the Uniform Trade Secret Act's preemption provisions are "worrisome if they are applied mechanistically or overly conceptually. Our common law is richly flexible in redressing wrongs for improper conduct . . . . It is neither necessary nor prudent to preclude all common law claims that are connected with the misappropriation of what a plaintiff claims are trade secrets." Id. (citations omitted).

Instead, the court adopted a reasoned approach making preemption appropriate only "where [the plaintiff's] other claims are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation." Id. (internal quotations omitted). See also, Micro Display Systems, Inc. v. Axtel, Inc., 699 F. Supp. 202, 205 (D. Minn. 1988) ("To the extent a cause of action exists in the commercial area not dependent on trade secrets, that cause of action continues to exist.").

CDC urges this court to follow the logic of the Powell Products decision, as well as the courts in a multitude of jurisdictions,[3] and reject the notion that any cause of action related to a set of facts that supports a claim for misappropriation of trade secrets is barred. Instead, this court should allow a plaintiff to bring additional tort claims when those claims are based "on the misuse of confidential information that does not meet the statutory definition of a trade secret" or should allow additional tort claims based on misappropriation of trade secrets, "some of which meet the statutory definition of a trade secret and some of which do not, . . . only to the extent that they are based on a trade secret; separate claims based on other factual allegations [should] survive." Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶32, 717 N.W.2d 781 (citations omitted).

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[3] See Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶32 & n.11-12, 717 N.W.2d 781 (citing multiple jurisdictions supporting the principle that "when the [other tort] claims are based on the misuse of confidential information that does not meet the statutory definition of a trade secret, the [Uniform Trade Secret Act] does not abrogate those claims; and . . . when the claims are based on misuse of confidential information, some of which meet the statutory definition of a trade secret and some of which do not, the [Uniform Trade Secret Act] abrogates claims only to the extent that they are based on a trade secret; separate claims based on other factual allegations survive.")

Under these theories, CDC prevails. For example, if the court determines that CDC's confidential PPA pricing information or the E-Bay bid information do not qualify as trade secrets, then CDC's claim for tortious interference survives. See Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc., 985 F. Supp. 827, 830 (N.D. Ill. 1997) (concluding that to the extent certain design specifications for materials did not constitute a trade secret, the plaintiff could maintain certain tort claim for breach of fiduciary duty). Moreover, even if the PPA pricing information and bid information are trade secrets, CDC's claim for intentional interference with prospective economic relations should proceed because CDC's additional tort claim for is more than just a restatement of the facts that support CDC's misappropriation of trade secrets claim. As discussed in Powell Products, a plaintiff should be allowed to "bring additional tort claims that, although involving a trade secret misappropriation issue, include additional elements not necessary for a misappropriation claim under the [Uniform Trade Secret Act]." 948 F. Supp. at 1474.

CDC's claim for intentional interference with prospective economic relations can withstand summary judgment because it is not solely based on Defendants' purported misappropriate of trade secrets. Under Utah law, "to sustain a claim for intentional interference with prospective economic relations[, a] plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 200 (Utah 1991).

To establish intentional interference with prospective economic relations, the defendant must have acted for an improper purpose or, alternatively, by improper means.[4] "Improper means are present 'where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules.'" Id. (quoting Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 308 (Utah 1982)). Improper means include 'violence, threats or other intimidation, *deceit or misrepresentation*, bribery, unfounded litigation, defamation or disparaging falsehood.'" Id. (quoting Leigh Furniture, 657 P.2d at 308) (emphasis added). Moreover, under Leigh Furniture, improper means can also include a violation of "an established standard of a trade or profession." Leigh Furniture, 657 P.2d at 308.

For example, in Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989), the Utah Court of Appeals affirmed the trial court's finding of improper means based on "voluminous and detailed operative factual findings." Id. at 1004. The court went through an extensive list of "at least thirteen acts that, taken together, constitute improper means as defined by the Utah Court in Leigh Furniture." Id.

The summary judgment record here establishes that Tradesmen, Carsey and Allen used improper means to interfere with CDC's prospective economic relations with Kennecott. First, Allen and Carsey violated established practices in the construction industry by using CDC's PPA labor and equipment pricing to develop Tradesmen's PPA.

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[4] Utah courts have defined an "improper purpose" as "a showing that the actor's predominant purpose was to injure the plaintiff." St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 201 (Utah 1991). CDC does not assert that Defendants acted with an "improper purpose" as defined in Utah law.

(R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K. Allen Dep. 38:8 – 45:24, 48:13-25, & ex. 21, 22 thereto)). Defendants could have attempted to create their own labor and equipment pricing. Instead, Tradesmen simply removed CDC's confidential files from Kennecott to use in developing Tradesmen's PPA. Even if the information contained in CDC's PPA was not a "trade secret" under the UUTSA because such information could have been obtained through other sources, Tradesmen's short cut was unethical and an improper means under Utah law.

Second, Allen and Carsey then prepared Tradesmen's bid for the E-Bay Project the day after Carsey helped prepare CDC's bid on the E-Bay Project. Again, rather than tell CDC the truth, Carsey simply remained silent, assisted with CDC's bid for the E-Bay Project, and then worked on the Tradesmen bid for the same project the next day with full knowledge of CDC's bid.

Third, Allen's association with Kennecott and Carsey's association with CDC during the competitive bid for the E-Bay Project raised serious conflict of interest issues. Carsey should have resigned once he joined Tradesmen, and Allen should have informed Kennecott of his involvement with Tradesmen.

Fourth, Carsey engaged in deceptive behavior and misrepresented material facts to CDC regarding his roles in Tradesmen. The list of egregious, unethical, and deceptive conduct is undisputed. Carsey was elected as Tradesmen's vice-president and project developer, and in fact became a part owner in Tradesmen, while still working at CDC. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 1

attached thereto (M. Lasater Dep. 36:18 – 37:17 & ex. 3 thereto)). During the pre-bid walkthrough with CDC on the E-Bay Project, Midgley specifically asked Carsey if he knew anything about Tradesmen. In response, Carsey lied by stating that he did not know who they were. (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 9 attached thereto (R. Midgley Dep. 222:21 – 223:14)). These material misrepresentations alone illustrate an improper means under Leigh Furniture. If CDC had known of Carsey's involvement with Tradesmen, and if Carsey had been honest about his association with Tradesmen, CDC would have *never* permitted Carsey to assist with CDC's bid for the E-Bay Project.

Likewise, in order for Tradesmen to have any chance of obtaining the E-Bay Project, Allen was required to hide his relationship with Tradesmen from Kennecott. Allen even went so far as to send an email to Smithwick of Kennecott's procurement group claiming not to know anything about Tradesmen—an email that he admitted was "false." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 6 attached thereto (K. Allen Dep. 86:11-19)). Kennecott's Larsen also testified that he was unaware of Allen's ownership in Tradesmen and, if Larsen had known of Allen's involvement with Tradesmen, "it would have definitely brought some concerns." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 4 attached thereto (D. Larsen Dep. 62:15 – 63:10)). Kennecott's Woolley testified that if he had known about Allen's ownership in Tradesmen, "it would have created an issue." (R. 326-27. Plaintiff's Opposition to Defendants' Motion for Summary Judgment, ex. 5 attached thereto (D. Woolley Dep. 44:14 – 46:13, 60:18 –

63:17)). And importantly, Smithwick testified that Allen's ownership would have raised a conflict of interest problem for Kennecott. (R. 326-27. Plaint0iff's Opposition to Defendants' Motion for Summary Judgment, ex. 8 attached thereto (S. Smithwick Dep. 34:10-20)).

In sum, CDC's claim for intentional interference with prospective economic relations does not depend solely on CDC's misappropriation of trade secrets claim. If, for the sake of argument, the trial court properly determined that CDC's misappropriation of trade secrets claim failed as a matter of law, CDC's claim for intentional interference could proceed because Defendants engaged in numerous improper acts, including the use of CDC's confidential information and other deceit and wrongful acts. CDC's intentional interference with prospective economic relations claim is not dependent on the misappropriation of trade secrets claim and could therefore go forward.

Accordingly, the trial court's dismissal of CDC's claim for intentional interference with prospective economic relations based on the preemption provision in the UUTSA is incorrect. Section 13-24-8 specifically displaces *conflicting* torts. Intentional interference with prospective economic relations based on the facts of this case was not a conflicting tort but could be found in addition, or in the alternative, to a UUTSA claim.

## III. THE COURT IMPROPERTY DISMISSED CDC'S BREACH OF FIDUCIARY DUTY AGAINST CARSEY

The trial court erred when it ruled that there was insufficient evidence to prove that "Carsey had a fiduciary relationship with [CDC]" and dismissed CDC's claim for breach of fiduciary duty with prejudice. (R. 345). Unfortunately, the court failed to

consider Utah case law indicating that there is, or at least should be, a fiduciary duty between employees and their employers. Utah courts have not directly addressed whether a "mere employee" owes a fiduciary duty of non-competition to his or her employer; however, there is indication that Utah courts would impose such a duty on employees.

In Prince, Yeates & Geldzahler v. Young, 2004 UT 26, ¶21, 94 P.3d 179, the Utah Supreme Court recognized Fryetech, Inc. v. Harris, 46 F.Supp 2d 1144 (D. Kan. 1999), as a case addressing this very issue. In Fryetech, the court rejected the contention that "mere employees" do not owe their employers a fiduciary duty of good faith and loyalty and emphasized that "while most of the cases which have addressed the fiduciary responsibilities of agents . . . have involved corporate directors or officers, there is no basis for concluding these are the only types of agents subject to fiduciary duties." 46 F. Supp. 2d at 1152. According to the Fryetech court, the cases imposing a fiduciary duty to corporate directors and officers "speak of the duties of agents without respect to their exact status." Id. (citing Bessman v. Bessman, 214 Kan. 510, 520 P.2d 1210, 1217 (Kan. 1974) ("An agent or employee of another is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." (internal quotations omitted)); Chernow v. Reyes, 570 A.2d 1282, 1283, 1284 (N.J. Super. Ct. App. Div. 1990) (holding that even though an employee's oral employment contract did not specifically prohibit competition, "an employee owes a duty of loyalty to the employer and must not, *while employed,* act contrary to the employer's interest," which necessarily includes "a duty not

to compete with the employer's business") (emphasis added)). Moreover, after providing its analysis of the Fryetech case, the Utah Supreme Court in Prince goes on to state that given certain Utah case law, "it is incorrect to conclude . . . that employees necessarily have no fiduciary duties to their employers. That is not the case." Prince, 2004 UT 26 at ¶22.

Under this analysis, employees in Utah would owe a fiduciary duty of good faith, loyalty, and non-competition to their employers throughout their term of employment. During oral argument, the trial court seemed to focus on the fact that Carsey should be able to compete in the workplace by using his knowledge and experience to find gainful employment elsewhere. CDC has no problem with Carsey or any other employee pursuing better employment opportunities and to engage in fair and honest competition. CDC's problem with Carsey's behavior arises when he began working for and developing a company that was directly competing with CDC for the exact same work *while still employed with CDC.*

The Utah Supreme Court seems to agree. In Muna, the court stated that "*[u]pon termination of his employment*, an employee has the prerogative to use his general knowledge, experience, memory and skill, however gained, provided he does not use, disclose, or impinge upon any of the secret processes or business secrets of his former employer." Muna, 625 P.2d at 697 (emphasis added). Thus, the trial court erred in granting summary judgment to Carsey based on its conclusion that Carsey did not have a fiduciary duty to CDC. Clearly, Utah law suggests that Carsey would have a fiduciary duty to CDC.

## IV. CDC'S CLAIM FOR CIVIL CONSPIRACY SHOULD BE ALLOWED TO PROCEED FORWARD.

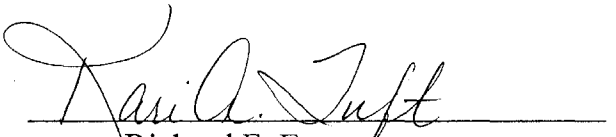
Because the trial court granted summary judgment on all claims, there was no claim left to support CDC's civil conspiracy claim. However, given the trial court's error in granting summary judgment and the overwhelming evidence supporting CDC's claims for misappropriation of trade secrets and intentional interference with prospective economic relations, at least one of these claims should be reinstated, thereby giving a basis for CDC's claim of civil conspiracy to proceed forward.

## CONCLUSION

The trial court erred in granting summary judgment on all of CDC's claims because the trial court failed to give all reasonable inferences to CDC as the non-moving party, failed to account for the disputed material facts, and failed to correctly analyze CDC's causes of action. Accordingly, CDC hereby requests that this court reverse the trial court's grant of summary judgment and reinstate all of CDC's claims. Oral argument is requested.

DATED this 4th day of May 2010.

VANTUS LAW GROUP, P.C.



Richard F. Ensor
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## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of May 2010, two true and correct copies of the foregoing **BRIEF OF APPELLANT CDC RESTORATION & CONSTRUCTION, LC** were mailed, by first class, postage pre-paid, to the persons named below:

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*Attorneys for Defendants Tradesmen Contractors, LLC Kenneth Allen, Paul Carsey, and Lindsey Mounteer*

IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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| CDC RESTORATION & CONSTRUCTION, LC,<br><br>Plaintiff,<br><br>v.<br><br>TRADESMEN CONTRACTORS, LLC, KENNETH ALLEN, PAUL CARSEY, JAY LASATER, MICHAEL LASATER, SHAUNA LASATER, and LINDSEY MOUNTEER,<br><br>Defendants. | **ORDER ON DEFENDANTS TRADESMEN CONTRACTORS, LLC, KENNETH ALLEN, PAUL CARSEY, AND LINDSEY MOUNTEER'S MOTION FOR SUMMARY JUDGMENT**<br><br>Civil No. 080908435<br>Judge Robert K. Hilder |

Defendant Tradesmen Contractors, LLC ("Tradesmen"), Kenneth Allen, Paul Carsey, and Lindsey Mounteer's (collectively "Defendants") Motion for Summary Judgment, joined by Defendants Jay Lasater, Michael Lasater and Shauna Lasater (collectively "Lasater Defendants") came on regularly for hearing on January 4, 2010. Defendants were represented by Romaine C. Marshall of Holland & Hart, Lasater Defendants were represented by P. Bruce Badger of Fabian & Clendenin, Plaintiff was represented by Richard F. Ensor of Vantus Law Group, P.C. The

Court, having considered the pleadings and motion papers, the record established by the respective parties, and having heard argument from counsel, and being otherwise fully advised, enters its Order consistent with its oral ruling.

The Complaint sets forth four claims for relief: (1) misappropriation of trade secrets pursuant to the Utah Uniform Trade Secrets Acts, Utah Code Ann. § 13-24-1, *et. seq.*, against Tradesmen, Paul Carsey and Kenneth Allen; (2) breach of fiduciary duty against Paul Carsey; (3) intentional interference with prospective economic relations against Tradesmen, Paul Carsey and Kenneth Allen; and, (4) civil conspiracy against all defendants.

Defendants, joined by the Lasater Defendants, have demonstrated that there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law dismissing each claim for relief.

A. Misappropriation of Trade Secrets

Plaintiff alleges that the following are its trade secrets implicated in this case: (a) Plaintiff's labor and equipment rates set forth in its Preferred Provider Agreement ("PPA") with Kennecott Utah Copper Company ("KUCC"); and, (b) Plaintiff's bid to perform concrete restoration work on the E-Bay North and South Basement floor at KUCC's refinery (the "Project") that Plaintiff submitted to KUCC on or about January 13, 2006.

A trade secret is statutorily defined. The Utah Uniform Trade Secrets Act reads in relevant part:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Utah Code Ann. § 13-24-2(4).

Plaintiff has failed to present evidence that is sufficient to establish a genuine issue of material fact that its labor and equipment rates derive independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons; specifically that Plaintiff's labor and equipment rates are not generally known or readily ascertainable by Tradesmen, Paul Carsey and Kenneth Allen based on Carsey's and Allen's substantial experience in the concrete restoration industry.

Plaintiff has also failed to present evidence that is sufficient to establish a genuine issue of material fact that Tradesmen, Paul Carsey and/or Kenneth Allen: (i) used Plaintiff's labor or equipment rates for Tradesmen's own bid for the Project; (ii) used Plaintiff's labor rates for Tradesmen's own PPA with KUCC; or (iii) ever saw or made use of Plaintiff's bid for the Project.

Accordingly, Plaintiff's claim for misappropriation of trade secrets is dismissed with prejudice and upon the merits.

B. Breach of Fiduciary Duty

Plaintiff has failed to present evidence that is sufficient to establish a genuine issue of material fact that Paul Carsey had a fiduciary relationship with Plaintiff. Accordingly, Plaintiff's claim for breach of fiduciary duty is dismissed with prejudice and upon the merits.

C. Intentional Interference With Prospective Economic Relations

Plaintiff has failed to present evidence that is sufficient to establish a genuine issue of material fact that Tradesmen, Paul Carsey or Kenneth Allen acted for the predominant purpose to injure Plaintiff.

Plaintiff has also failed to present evidence that is sufficient to establish a genuine issue of material fact that Tradesmen, Paul Carsey or Kenneth Allen acted by improper means that does not arise from a factual episode that necessarily relies on the information at issue being a trade secret. Consequently, Plaintiff's claim for intentional interference with prospective economic relations is barred by the preemption provision of the Utah Uniform Trade Secrets Act, Utah Code Ann. § 13-24-8, which "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret."

Accordingly, Plaintiff's claim for intentional interference with prospective economic relations is dismissed with prejudice and upon the merits.

D. Civil Conspiracy

The underlying claims of misappropriation of trade secrets, breach of fiduciary duty and intentional interference with prospective economic relations having been dismissed, there is no basis for the claim of civil conspiracy.

Further, Plaintiff has failed to present evidence that is sufficient to establish a genuine issue of material fact for any claim that may serve as a basis for civil conspiracy that does not arise from a factual episode that necessarily relies on the information at issue being a trade secret. Consequently, the claim for civil conspiracy is barred by Utah Code Ann. § 13-24-8.

Accordingly, the claim of civil conspiracy is dismissed with prejudice and upon the merits.

IT IS SO ORDERED.

Dated this 26th day of January, 2010.

THIRD DISTRICT COURT

Judge Robert K. Hilder

Approved as to form:

VANTUS LAW GROUP, P.C.

Richard F. Ensor
*Attorneys for Plaintiff CDC Restoration & Construction, LC*

FABIAN & CLENDENIN

P. Bruce Badger
*Attorneys for Defendants Jay, Michael, and Shawna Lasater*

Further, Plaintiff has failed to present evidence that is sufficient to establish a genuine issue of material fact for any claim that may serve as a basis for civil conspiracy that does not arise from a factual episode that necessarily relies on the information at issue being a trade secret. Consequently, the claim for civil conspiracy is barred by Utah Code Ann. § 13-24-8.

Accordingly, the claim of civil conspiracy is dismissed with prejudice and upon the merits.

IT IS SO ORDERED.

Dated this ____ day of _____, 2010.

THIRD DISTRICT COURT

_____
Judge Robert K. Hilder

Approved as to form:

VANTUS LAW GROUP, P.C.

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Richard F. Ensor
*Attorneys for Plaintiff CDC Restoration & Construction, LC*

FABIAN & CLENDENIN

P. Bruce Badger
*Attorneys for Defendants Jay, Michael, and Shawna Lasater*

## CERTIFICATE OF SERVICE

I certify that on January 25, 2010, I caused to be served a copy of the foregoing to the following by:

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| Richard F. Ensor<br>VANTUS LAW GROUP, P.C.<br>3165 East Millrock Drive, Suite 160<br>Salt Lake City, Utah 84121<br>*Attorneys for Plaintiff CDC Restoration & Construction, LC* | ☒<br>☐<br>☐ | U.S. Mail, postage prepaid<br>Hand Delivery<br>Fax |
| P. Bruce Badger<br>Fabian & Clendenin<br>215 South State Street, 12th Floor<br>P. O. Box 510210<br>Salt Lake City, Utah 84151 | ☒<br>☐<br>☐ | U.S. Mail, postage prepaid<br>Hand Delivery<br>Fax |